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IN THE

Supreme Court of the United States

SPECIALIST HECTOR RODRIGUEZ, ***Petitioner***

v.

UNITED STATES OF AMERICA, ***Respondent***

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Armed Forces

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF AFLSA/JAJA IN SUPPORT OF PETITIONER

AFLSA/JAJA respectfully submits this brief *amicus curiae* is assist this Honorable Court by presenting information on mental health treatment in the military, as well as the operation of certain privileges and "limited use" regulations to show that a psychotherapist-patient privilege existed in the military following this Honorable Court's decision in *Jaffee v. Redmond*[1] that was both practicable and not inconsistent with the Uniform Code of Military Justice (UCMJ), the Military Rules of Evidence (Mil.R.Evid.) or the Manual for Courts-Martial (MCM), as set forth in Mil.R.Evid. 501(a). Counsel for both the petitioner and the respondent have consented to the filing of this *amicus curiae.*[2]

STATEMENT OF THE CASE

Specialist Hector Rodriguez deployed with his unit to Bosnia in support of Operation Joint Endeavor. On May 2, 1996, upon being told by his wife that she wanted a divorce, Specialist Rodriguez went to an empty bunker, loaded one round into his M249 squad automatic weapon, tied a cord to the trigger, and propped the weapon up facing him, preparing to shoot himself. The weapon subsequently discharged, shooting Specialist Rodriguez in the abdomen.

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[1] 518 U.S. 1 (1996).

[2] *Appendix.*

Specialist Rodriguez was evacuated to Landstuhl Regional Medical Center in Germany for medical treatment. During this medical treatment, he received psychiatric evaluation and counseling from Dr. Alfano, a licensed psychiatrist and GS-13 federal civilian physician.

A military commander charged Specialist Rodriguez with malingering by intentional infliction of self-injury for the purpose of avoiding work, duty or service. A military judge sitting as a general court-martial tried Specialist Rodriguez at a contested trial in January 1997. At trial, Specialist Rodriguez' defense was that, at the last minute, he abandoned his attempt to shoot himself, but the weapon accidentally fired while he was retrieving it.

The Army called Dr. Alfano as a witness to testify against Specialist Rodriguez regarding statements Specialist Rodriguez made to him while undergoing psychiatric treatment. Defense counsel challenged the admissibility of Specialist Rodriguez' statements to Dr. Alfano, asserting that they were protected by the federal common law psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee*. The military judge denied the motion to suppress Dr. Alfano's testimony, ruling that under Mil. R. Evid. 501 and Article 36 of the UCMJ, 10 U.S.C. § 836, the common law psychotherapist-patient privilege is not applicable in the military, at least for a military psychiatrist. Thereafter, Dr. Alfano testified about Specialist Rodriguez' admissions of intentional self-injury. Dr. Alfano's testimony was the only testimony directly

contradicting the defense theory that the weapon discharge was accidental.

The military judge found Specialist Rodriguez not guilty of malingering – which requires the intent to avoid work, duty or service – but guilty of self-injury without intent to avoid service, a violation of 10 U.S.C. § 934. The military judge sentenced Specialist Rodriguez to a dishonorable discharge, confinement for 354 days, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. The court-martial convening authority approved the sentence.

Specialist Rodriguez appealed his conviction, asserting that the military judge erred when he ruled that the common law psychotherapist-patient privilege could not be claimed in courts-martial. On October 30, 1998, the Army Court of Criminal Appeals affirmed the findings of guilty and the sentence. On September 25, 2000, a divided court of appeals affirmed the findings and the sentence, holding that the military judge did not err in admitting Dr. Alfano's testimony. The stated basis for the court of appeals' ruling is, *inter alia*, that recognizing the common law psychotherapist-patient privilege would conflict with a military evidentiary rule that rejects a general physician-patient privilege. Only two of the five judges on the court of appeals rendered the opinion of the court, with a third judge concurring in part and in the result.

REASON FOR GRANTING THE WRIT

Mil.R.Evid. 501(a) limits a claim of privilege to those privileges required or provided for in the United States Constitution, an Act of Congress applicable to trial by courts-martial, the Military Rules of Evidence or the Manual for Courts-Martial, or the principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the UCMJ, the Military Rules of Evidence, or the MCM.[3]

Mil.R.Evid. 501(a)(4) directly incorporates the term "principles of common law" as it exists in FRE 501, subject to two limitations:

1. The "principle of common law" must be generally recognized in criminal cases in the United States district courts; and

2. The application of these principles must be "practicable", and "not contrary to or inconsistent with the code, these rules, or this Manual."

The psychotherapist-patient privilege became applicable to trials by courts-martial as a result of this Honorable Court's decision in *Jaffee*. The President determined that the federal common law provisions, with certain inapplicable exceptions, may be claimed by an accused in a court-martial. Despite the fact that

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[3]MCM, United States, Mil.R.Evid. 501(a) (1995 ed.).

the decision to recognize a privilege rests with the President, the United States Court of Appeals for the Armed Forces has created its own rules for courts-martial that are directly contrary to the rules properly promulgated by the President. This Honorable Court should exercise its supervisory power to ensure that the Court of Appeals for the Armed Services does not preempt and frustrate the constitutional and statutory scheme that empowers the President to determine the evidentiary rules for courts-martial.

The purpose of this brief of *amicus curiae* is to discuss the policy favoring recognition of the privilege, as well as the existence and operation of various privileges available to military personnel at the time of the petitioner's court-martial to show that the recognition of psychotherapist-patient privilege was both practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, the Rules for Courts-Martial, or the Manual for Courts-Martial.

Background on military mental health care

In general, military mental health care is similar to that provided in the civilian sector. All of the same issues seen in small practices to large medical centers have their counterpart in the military. Where military practice differs from its civilian counterpart is in relation to administrative military duties and the special challenges combat and combat-related pressures can create.

However, the military population shares with the civilian counterpart population the stigma associated with getting psychological care. Such

stigma has a long history in American society. Prior to the early 19th century, Americans hid their mentally ill family members at home and provided whatever care they could. Later, private asylums became popular places to hide those with mental problems. From the 1850s to early in the 20th century the mental health profession grew, but the stigma of being "crazy" continued. During the 20th century, mental health institutions and the profession of psychiatry rapidly expanded, especially after World War I. Unfortunately, the stigma still hung on, driven now by the belief that "weak character" led to mental disease.[4]

In the 1950s there was a movement toward more scientific approaches to mental illness, especially in the area of alcohol and drug treatment. From then until the end of the 1970s, there was a major shift from criminalization of alcohol and drug problems to public health measures, and some inroad was made in educating the general public about the emotional and behavioral underpinnings of mental health problems. Despite the new emphasis on psychiatry as a science and a concerted effort to educate the public about mental health, the stigma remains and still interferes with people getting the care they need. The sensitive nature of emotional problems, and potential stigmatization of persons seeking psychiatric care were noted by this Honorable Court in *Jaffee*.

But the stigma associated with seeking mental health help is not the only stigma. The fear that

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[4] GERALD N. GROB, FROM ASYLUM TO COMMUNITY: MENTAL HEALTH POLICY IN MODERN AMERICA (1991).

others will learn of the root problem probably keeps military personnel away from mental health clinics.

Soon after this Honorable Court released *Jaffee*, Air Force Times reported that "service members may now be able to confide their darker secrets to military mental-health professionals without fear their commanders will find out."[5] Just two weeks after the publication of that article, a case at Elmendorf Air Force Base, Alaska, thrust the absence of patient confidentiality into the national spotlight. There, a 21 year old daughter of a service member, the alleged victim in a rape case, had her mental health records confiscated by military investigators. The girl's mother tore up the records in an effort to conceal her daughter's confidences, but they were pieced back together. Both *Jaffee* and the Elmondorf case prompted a fair amount of activity at the highest levels of the Air Force concerning the issue of confidentiality in Air Force mental health care.

The "practicability" of recognizing a psychotherapist-patient privilege following Jaffee

There is no official military guidance on what is considered "practicable" within the confines of military service. Neither is there any existing evidence that the military mental health or legal system was not capable of applying a psychotherapist-patient privilege. Indeed, with the President's issuance of an Executive Order[6]

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[5] Nick Adde, *Court Ruling Prompts New Look at Confidentiality*, AIR FORCE TIMES, Aug 8, 1996, at p. 14.

[6] Executive Order No. 13140, 64 Fed. Reg. 55,115 (1999).

establishing an enumerated psychotherapist-patient in Mil.R.Evid.513, it is apparent that such a privilege is extremely practicable.

A. *Policy Considerations Supporting the Recognition of a Psychotherapist-Patient Privilege*

The Constitution entrusts the power to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces to Congress[7] and names the President as the Commander in Chief[8]. As part of this authority, Congress has authorized the President to promulgate rules for courts-martial, to specifically include the Manual for Courts-Martial.[9]

However, Congress did not give this rule-making power without guidance. Article 36, UCMJ, directs the President to, "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."[10] Congress, thus wanted to keep the military system closely tied to the federal system, separated only when required by the unique

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[7] U.S. CONST. art. I, sec. 8, cl. 14.
[8] U.S. CONST. art II, sec. 2, cl. 1.
[9] Art. 36, UCMJ, 10 U.S.C. § 836 (1983). *See* S. Rep. 98-197, 96th Cong., 1st Sess. 1979, reprinted in 1979 U.S.C.C.A.N. 1818 (Article 36 intended to authorize the President to promulgate the Manual for Courts-Martial.)
[10] Art. 36, UCMJ, 10 U.S.C. § 836 (1983).

circumstances of the military. Senator Sam Nunn characterized Congress' intent, when exercising its Constitutional mandate, as a careful balancing of the rights of individual service members and the needs of the armed forces.[11] For him, Congress has played a leading role in enhancing the rights of service members.[12]

One way a military member's rights are protected is through limitations on the use of mental health information. Access to a military member's mental health records is limited by the Privacy Act, allowing access by agency officials with an official need to know. Those agency officials include commander, law enforcement agents conducting investigations, and defense counsel under appropriate discovery procedures under the MCM.[13] In certain cases, Congress has taken specific steps to protect misuse of the military mental health system by commanders for improper purposes. This legislation, as applied by the Department of Defense, has imposed significant procedural safeguards for

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[11] The Honorable Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 566 (1994).

[12] *Id.* at 565 (Senator Nunn lists as examples: enacting the UCMJ, establishing a civilian tribunal-the U.S. Court of Military Appeals-to review courts-martial, authorizing the appeal of specified military justice cases directly to the Supreme Court, enhanced procedural rights in the promotion process, expanded opportunity for wearing religious apparel while in uniform, and providing protection for military whistleblowers). The U.S. Court of Military Appeals was later renamed the United States Court of Appeals for the Armed Forces. 10 U.S.C. § 924 as amended by Act of Oct. 5, 1994, Pub.L. 103-337, 108 Stat. 2831, 2832 (1994).

[13] *See* R.C.M. 701.

military members ordered to undergo command-directed mental health evaluations.[14]

In addition to enhancing protections for military members against misuse of mental health information, Congress has acted to protect crime victims' rights. In recent years, Congress has taken significant legislative steps to ensure that crime victims are treated with fairness and respect for the victim's dignity and privacy.[15] The Department of Defense has implemented victims' rights programs in accordance with this Congressional policy and direction.[16]

B. Confidentiality and the Military's "Need to Know"

The importance of confidentiality to successful mental health care treatment, recognized by this Honorable Court in *Jaffee*, also exists within the military community. However, the countervailing need for the military to know the mental status of its personnel is likewise important. The mission of the military necessarily involves the use of dangerous equipment, access to weapons and classified information, control of nuclear weapons, and life-and-death reliance of the stability of other service members.

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[14] *See* Pub. L. 101-50, "National Defense Authorization Act for Fiscal Year 1991" (NDAA FY 91 , Pub. L. 101-484, NDAA FY 93 (Oct. 23, 1992); DoDD 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES (Sept. 14, 1993).

[15] *See* 42 U.S.C. §10601, 10681 (1995); 18 U.S.C. § 1512-1514 (1984).

[16] *See* DoDD 1031.1, VICTIM AND WITNESS ASSISTANCE (Nov. 23, 1994); DoDI 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (Dec. 23, 1994).

The lack of confidentiality of mental health care treatment has resulted in military members delaying or avoiding treatment and in the underdiagnosis of mental illness.[17] Military members feel that seeking help will adversely affect their careers, particularly if the member is on flight status or has a sensitive security clearance. A leader may avoid seeking help for mental illness for fear that his subordinates will lose confidence in his leadership. Ninety-five percent of suicides are tied to mental illness.[18] Although the military suicide rates are roughly commensurate with rates in the civilian sector, the military must proactively encourage members to seek mental health care to combat the "centuries old military culture in which strength is prized and anything that could be perceived as weakness is concealed."[19] This cost of service members delaying or avoiding treatment must be weighed against the need of the military to know the mental status of its members and be able to accomplish its mission of defending our nation.

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[17] LCDR Taylor L. Porter & LT W. Brad Johnson, *Psychiatric Stigma in the Military,* 159 MIL. MED. 602 (1994). *See* CPT Anderson B. Rowan, *Demographic, Clinical, and Military Factors Related to Military Mental Health Referral Patterns,* 161 MIL. MED. 324 (1996); Regina Pedigo Galvin, *Even Soldiers Get the Blues, But Issues of Stigma, Confidentiality Keep Those in Need from Getting Help,* ARMY TIMES, July, 29, 1996.

[18] Sue Goetinch & Tom Siegfried, *Mentally Ill Fight Disease and Stereotypes,* THE DALLAS MORNING NEWS, Apr. 28, 1996, at 1A.

[19] Neal A. Lewis, *Military Conducting Anti-Suicide Campaign,* THE SEATTLE TIMES, May 19, 1996, at A1.

C. *An Examination of the Operation of Other Privileges Available to Service Members*

The support given other privileges in both the Military Rules of Evidence and other "quasi-privileges" found in various military regulations support the argument that a psychotherapist-patient privilege following this Honorable Court's decision in *Jaffee* was "practicable." That Congress and the military departments have seen fit to carve out exceptions concerning the information commanders may access in matters involving religion, alcohol and drug abuse, AIDS, and various other mental health issues, show that concerns such as privacy and encouragement of health can be more important than obtaining evidence in a criminal case. The fact that these "exceptions" exist without an impairment of military readiness demonstrates that there was room for an accommodation of both the military's legitimate "need to know" and the service member's need for confidentiality in psychotherapy. Several important concepts highlighted by this Honorable Court in *Jaffee* are evident in the privileges and quasi-privileges discussed below--the recognition that certain goals are more important than obtaining evidence, that confidentiality is essential to achieving these goals and that in each, the privilege has been fashioned to encourage the attainment of the desired goal, and no more.

1. *Military Rule of Evidence 503.* Mil.R.Evid. 503 provides that confidential communications made as either a formal act of religion or as a matter of conscience to clergymen or their assistants is privileged. Mil.R.Evid. 503 was taken from proposed

FRE 506[20] but was first recognized in military practice in 1951. Encouraging individuals to communicate with their clergy has long been recognized as a publicly desirable goal, though it was not recognized under common law. The religious privilege provided by Mil.R.Evid. 503 most closely resembles the intimate and personal relationship present in the psychotherapeutic relationship. Indeed, many clergy and their assistants act as secular quasi-psychotherapists part of the time in counseling soldiers.

2. *Limited use regulations.* There are a number of military regulations which provide a limited form of confidentiality to those who would possibly not otherwise disclose certain information or take advantage of programs designed to encourage certain types of behavior. The regulations are in effect to support military alcohol and drug programs. HIV-positive and related public heath threat programs, and certain mental health programs.

a. Alcohol and Drug Abuse Programs. Air Force Instructions (AFIs) provide that limited use may be made of a military member's voluntary, self-disclosure of drug use or possession.[21] Specifically, AFI 36-3701, para. 5.5.1.1.2, provides that voluntary disclosure may not be used against a military

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[20] 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL (6th ed. Supp. 1995, 1996), note 53 at 556 (citing to 2 S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 601-02 (5th ed. 1990).

[21] AFI 36-2701, *Social Actions Program*, para. 5.5.1.1 (Aug 16, 1996); AFI 51-201, *Administration of Military Justice*, para. 8.3 (July 28, 1994).

member in a Uniform Code of Military Justice action, or to characterize the service of the member in an administrative discharge action. Army Regulation 600-85 provides the same protection to its soldiers. The Air Force requires a voluntary disclosure which specifically excludes self-referrals after apprehension, initiation of investigation for drug abuse, selection for urine testing, notice of administrative separation for drug abuse, or entry into a substance abuse rehabilitation program.[22] The purpose of such programs has been to facilitate identification of substance abusers, and treatment and rehabilitation of those who desire it and demonstrate the potential for it, while at the same time prevent a service member from misusing the program solely to escape responsibility for illegal acts.

b. HIV Programs. To encourage individuals who test positive for HIV to obtain treatment and continue to be contributing members of the military, the military adopted an aggressive AIDS program soon after the identification of the disease. Nonetheless, the program's mandatory testing requirements for active duty service members caused some concern about the concomitant loss of privacy and autonomy. In response to such concerns, Congress passed legislation in 1987 establishing a limited use policy for information concerning HIV-positive individuals, which specifically included confidentiality protection, which was implemented in the Department of Defense.[23] AFI 48-135

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[22] AFI 37-2701, *supra*, para. 5.5.1.2.

[23] Restriction on Use of Information Obtained During Certain Epidemiologic Assessment Interviews, Pub. L. No. 99-661, Title

establishes the Air Force's HIV program and sets forth its limited use restriction. Specifically, AFI 48-135, para. A10.2.1, provides that information obtained during, or as a result of, an epidemiologic assessment interview may not be used against a member in any adverse action. The limitations specifically do not preclude use of the information for rebuttal or impeachment in actions taken against the member based on independently derived information, nor do they bar introduction of evidence for impeachment or rebuttal purposes in any proceeding in which evidence about such matters were first introduced by the member. The instruction does not provide the identified HIV-positive member with confidentiality. In fact, the AFI requires that the member's commander be immediately notified of a confirmed case of infection so that a "safe sex" order can be issued. However, the AFI requires the order to be securely stored so as to protect the member's privacy and confidentiality. Furthermore, release of the information outside the Air Force is prohibited without the member's consent. Finally, the usual protection of sensitive medical information through the provisions of the Privacy Act apply. The purpose of these limitations has been to facilitate identification and treatment of AIDS. Basically, the theory underlying the limitations on use of this information is that the public health goals of the program outweigh the loss of that information in the criminal process.

VII, § 705(c), 100 Stat. 3904 (Nov. 14, 1996); Ass't Sec. Of Def. (Readiness Support) Memorandum, Policy of Identification, Surveillance, and Administration of Personnel Identified with Human Immunodeficiency Virus (HIV) -- Action Memorandum, P.B.7.d (Nov 23, 1988).

c. Mental Health Programs. In response to Congressional hearings into alleged misuse of the military mental health system by commanders to punish "whistle blowers" or those perceived as "problem" soldiers, Congress passed legislation in 1993 aimed at controlling commanders' authority to order involuntary psychiatric evaluations.[24] The law directed the military to provide a specific list of due process rights to those service members ordered to undergo psychiatric evaluation by their commanders. As a result, the Department of Defense issued a directive to the military departments requiring them to establish procedures incorporating the Congressionally mandated controls.[25] One Congressional goal for these new procedures in the military mental health evaluation process was to provide greater protection to the military member. The legislation demonstrates Congressional willingness to take action in those areas where it feels military action is lacking.

In the Air Force, the new procedures required a two-day waiting period between the order and the evaluation, except in emergency situations.[26] AFI 44-109 further provides that member ordered to undergo evaluation must receive written notice setting forth the specific reason(s) for the referral; the name of the mental health provider consulted about the referral;

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[24] Mental Health Evaluations of Members of Armed Forces, Pub. L. No. 101-510, Title V, § 554 (Nov. 5, 1990), as amended Pub. L. No. 102-484, Title V, § 546 (a)-(h), 106 Stat. 2416 (Oct 23, 1992).
[25] DoD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces (Sept. 14, 1993).
[26] AFI 44-109, *Mental Health and Military Law* (Aug 1, 1996), para. 1.3.

positions and telephone numbers of persons who can give assistance to the service member (e.g., military defense counsel, Inspector General); and a list of the member's rights regarding the referral. The installation commander is required to provide a neutral and detached reviewing officer to review any involuntary admission and direct appropriate investigation into any indication that the ordered evaluation was for an improper purpose. Finally, misuse of the evaluation process as a reprisal is punishable under the UCMJ.

CONCLUSION

Following this Honorable Court's decision in *Jaffee*, a psychotherapist-patient existed in military courts-martial through the mandate of Mil.R.Evid. 501(a). Such a privilege was both practicable and not contrary to the UCMJ, the Military Rules of Evidence, or the MCM. This brief has focused on the issue of the practicability of the privilege by examining the policy supporting such a privilege, as well as a discussion of similar privileges available to service members to show that the psychotherapist-privilege was equally practicable. However, the strongest evidence of the practicability of a psychotherapist continues to be the promulgation by the President of Mil. R.Evid. 513 subsequent to the petitioner's court-martial.

AFLSA/JAJA respectfully requests this Honorable Court grant the Petitioner's request for a writ of certiorari.

Respectfully submitted,

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January 11, 2001

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Re: Rodriguez v. United States, No. 00-1038

Dear Major Vires:

As requested in your letter of January 9, 2001, I hereby consent to the filing of a brief amicus curiae on behalf of the Appellate Defense Division, Air Force Legal Services Agency in support of the petitioner in the above-styled case.

Sincerely,

Seth P. Waxman
Solicitor General

cc: William K. Suter, Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

IN THE SUPREME COURT OF THE UNITED STATES

SPECIALIST HECTOR RODRIGUEZ,
U.S. Army, Petitioner,

v.

UNITED STATES, Respondent.

No. 00-1038

PETITIONER'S CONSENT TO SUBMISSION OF *AMICUS CURIAE* BRIEFS

Petitioner Specialist Hector Rodriguez, by and through counsel, hereby consents to the submission of *amicus curiae* briefs in the above-captioned matter by the defense appellate divisions of the U.S. Navy and the U.S. Air Force.

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